No. 83-120

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE NEW YORK RACING ASSOCIATION, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

NEW YORK STATE LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board's promulgation of its rule declining to assert jurisdiction over the horseracing industry and its subsequent refusal to amend or repeal that rule are matters "committed to agency discretion by law," within the meaning of the Administrative Procedure Act, 5 U.S.C. 701(a)(2), and, accordingly, are not subject to judicial review under U.S.C. 702.

2. Whether, in any event, the Board considered all of the relevant factors and made a reasonable judgment in promulgating its horseracing rule and in subsequently declining to amend or repeal that rule.

3. Whether the Regional Director's dismissal of petitioner's representation petition filed under Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. 159(c)(1), violated a clear statutory mandate and thus furnished a basis for district court review under the exception recognized in *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 708 F.2d 46. The memorandum and order of the district court (Pet. App. 26a-40a) is reported at 110 L.R.R.M. 3177. The Board's order denying the petitions to repeal or amend Rule 103.3 (Pet. App. 43a-48a) is reported at 243 N.L.R.B. 314. The Regional Director's decision denying petitioner's representation petition (Pet. App. 49a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1983. The petition for a writ of certiorari was filed on July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 159(c)(1) and 164(c)(1), the Administrative Procedure Act, 5 U.S.C. 701(a) and 702, and the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. 103.3, are reproduced at Pet. App. 51a-56a.

STATEMENT

Petitioner, the New York Racing Association, Inc. ("NYRA"), conducts thoroughbred horseracing and parimutuel wagering at three racetracks in New York State. The American Totalisator Company, Inc. ("ATC") is engaged in supplying parimutuel betting equipment and services to racetracks throughout the United States and Canada. On February 9, 1979, and March 26, 1979, ATC and the NYRA, respectively, filed petitions with the National Labor Relations Board seeking the repeal, or, in the alternative, the amendment, of Section 103.3 of the Board's Rules and Regulations, 29 C.F.R. 103.3, known as the Board's "horseracing rule," and requesting the Board to assert jurisdiction over the NYRA.[1] On July 3,

[1] In 1972, pursuant to the informal rule-making procedures of the Administrative Procedure Act, 5 U.S.C. 553, the Board announced in the Federal Register its intention to consider promulgating a rule asserting jurisdiction over the horse and dog racing industries, and invited comment by interested

1979, the Board issued an order denying the petitions (Pet. App. 43a-48a). While acknowledging (*id.* at 44a) that the operations of ATC and the NYRA were related to interstate commerce and recognizing (*ibid.*) the large revenues generated by the NYRA's racing and parimutuel wagering activities, the Board explained (*ibid.*) that it "has consistently declined to assert jurisdiction over labor disputes in the horseracing and dogracing industries, as well as over labor disputes involving employers whose operations are an integral part of these racing industries," and concluded (*id.* at 45a) that it would continue to do so "[a]bsent an indication from Congress that [its] refusal to assert jurisdiction is contrary to congressional mandate." Chairman Fanning and Member Truesdale dissented (*id.* at 46a-48a).

In a separate, subsequent proceeding, the NYRA petitioned the Board's Regional Director for an investigation and certification of bargaining representative under Section 9 of the Act, 29 U.S.C. 159. On September 30, 1980, after investigation, the Regional Director declined to assert jurisdiction because the NYRA is an employer in the horseracing industry and because the Board, both by its decisional law and pursuant to Section 103.3 of its Rules and Regulations, had specifically declined to " 'assert its jurisdic-

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parties. The Board received approximately 90 responses to this notice, the vast majority of which were opposed to the assertion of jurisdiction by the Board. After considering this record, the Board decided to continue to decline to assert jurisdiction, and subsequently promulgated Rule 103.3. See Pet. App. 4a; 38 Fed. Reg. 9507, 9537 (1973). This Rule (29 C.F.R. 103.3) provides that "[t]he Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the act involving the horseracing and dogracing industries" (Pet. App. 53a).

tion in any proceeding under Section[s] 8, 9 and 10 of the Act involving the horseracing and dogracing industries.' " Pet. App. 49a, quoting Rule 103.3. The NYRA did not seek the Board's review of the Regional Director's decision.

2. On October 6, 1980, the NYRA filed this action in the United States District Court for the Eastern District of New York seeking declaratory and injunctive relief from the Board's refusal to assert jurisdiction in the two above-described proceedings. Pet. App. 29a. The Board moved to dismiss the complaint on the ground that the district court lacked jurisdiction to review or enjoin the Board's administrative actions since the Board's decision not to assert jurisdiction was within its discretion and contravened no clear statutory or constitutional limitation. On December 7, 1981, the district court denied the Board's motion to dismiss and ordered that a further record be developed in the district court. *Id.* at 6a.

During the ensuing trial, the NYRA introduced evidence demonstrating its substantial annual revenue in the horseracing business and showing that the Board asserts jurisdiction over other industries that are subject to regulation by state administrative agencies.[2] On July 28, 1982, the district court issued its memorandum and order, concluding (Pet. App. 26a-40a) that it had jurisdiction to review the Board's determinations; that the Board's decision not to assert jurisdiction over the NYRA disregarded statutory limitations on the Board's discretion; and that the Board had abused its discretion in declining

[2] The Board presented no evidence at the trial, contending that the district court's review was limited to the record that was before the Board at the time it promulgated its horseracing rule.

to assert jurisdiction. In the district court's view (*id.* at 39a), before exercising its discretion to deny jurisdiction over an entire class of employers, the Board must form a "reasoned opinion that no labor dispute involving that class or industry will sufficiently impact interstate commerce." The court concluded (*id.* at 40a) that the Board had not conducted "the requisite inquiry into the volume of commerce affected by potential labor disputes involving the racing industry generally or [the NYRA] in particular" either at the time it promulgated Rule 103.3 or when it denied the NYRA's petition for a representation hearing. It accordingly remanded the Board's decisions declining to assert jurisdiction over the NYRA to the Board for reconsideration in light of the court's findings and conclusions and such other data as the Board might wish to consider. *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-25a. It concluded, first, that the Board's 1973 promulgation of Rule 103.3 declining to assert jurisdiction over the horseracing industry and its subsequent refusal to repeal or amend that rule were matters "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2) and, accordingly, were not subject to district court review under 5 U.S.C. 702. Pet. App. 8a-19a. The court found that the language of Section 14(c)(1) of the National Labor Relations Act, 29 U.S.C. 164(c)(1) (quoted at page 7, *infra*), "immediately suggests that the decision to decline jurisdiction is 'committed to agency discretion.'" Pet. App. 13a. The court of appeals concluded, moreover, that the legislative history of Section 14(c)(1) "confirms that it grants very broad discretion" (Pet. App. 14a) and that "Congress intended also that the Board's exercise of its discretion

would ordinarily be unreviewable" (Pet. App. 16a; footnote omitted).

The court of appeals further concluded (Pet. App. 19a-20a) that, while there was jurisdiction in the district court to review the procedures by which the Board reached its decisions, both the promulgation of the horseracing rule by the Board in 1973 and its decision in 1979 not to amend the rule were procedurally sound.

Finally, the court of appeals concluded (Pet. App. 20a-24a) that the district court lacked jurisdiction to review the Regional Director's denial of the NYRA's 1980 representation petition filed under Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1). Specifically, the court held (Pet. App. 21a-23a) that the facts of this case did not fall within the narrow exception carved out in *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958), permitting district court jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

ARGUMENT

The court of appeals correctly applied established principles of law to the facts of this case. Further review therefore is not warranted.

1. Section 702 of the Administrative Procedure Act, 5 U.S.C. 702, affords a right of judicial review of agency action to "[a] person suffering legal wrong because of agency action * * *." This provision does not apply, however, "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). It is common ground between petitioner and the Board that the question whether the district court had

jurisdiction to review the Board's promulgation of Rule 103.3 and its refusal in 1979 to repeal or amend that rule turns on whether the Board's action was "committed to agency discretion by law," and that the standard to be used in resolving that question is whether the enabling statute is " 'drawn in such broad terms that in a given case there is no law to apply' " (*Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). Petitioner contends, however, that the court of appeals erred in applying the "no law to apply" standard to Section 14(c)(1) of the NLRA. There is no merit to this contention.

a. Section 14(c)(1) of the NLRA, 29 U.S.C. 164(c)(1), provides:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to [the Administrative Procedure Act], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

As the court of appeals noted (Pet. App. 13a), this statutory language "immediately suggests that the decision to decline jurisdiction is 'committed to agency discretion.' " Not only does it speak of the Board's discretion generally, "but it specifically grants the Board power to decline jurisdiction 'where, *in the opinion of the Board*, the effect of such labor dispute on commerce *is not sufficiently substantial to warrant*

the exercise of its jurisdiction' " (Pet. App. 13a; emphasis by the court). The italicized words, the court added (*ibid.*), "make clear that even if the effect on commerce of disputes in a particular case or industry is substantial, the Board has the power to make the judgment that the assertion of jurisdiction is not warranted." Thus, not only is "[t]he impact of labor disputes—not of the industry—on commerce * * * made a primary consideration, but[, moreover,] whether or not [that impact] is sufficient to warrant exercise of jurisdiction is a relative question, and the other factors that the Board will consider in weighing its decision are left unstated" (Pet. App. 13a-14a).[3]

Furthermore, as the court of appeals concluded (Pet. App. 14a-16a), the legislative history of Section 14(c) confirms that it was Congress's intent to grant broad discretion to the Board. Section 14(c) was enacted to remedy the so-called "no man's land" left by this Court's decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957), which excluded the states from regulating a business even where the Board had declined to assert jurisdiction, and in answer to the Court's holdings in *Office Employes, Local No. 11* v. *NLRB*, 353 U.S. 313 (1957), and *Hotel Employees Local No. 255* v. *Leedom*, 358 U.S. 99 (1958), that the Board could not decline jurisdiction

[3] By contrast to the discretionary language of the main portion of Section 14(c)(1), the proviso imposes a precisely defined limit on the Board's discretion, namely, that the Board "shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959." See Pet. App. 52a. (Since the Board has never asserted jurisdiction over the horseracing or dogracing industries, the proviso is not at issue here.)

over entire classes of employers. Congress considered several solutions to these problems, including requiring the Board to assert jurisdiction over all labor disputes affecting interstate commerce[4] and providing for state agencies, as agents of the Board, to apply federal law in cases over which the Board could have asserted jurisdiction directly but chose not to do so.[5] Recognizing, however, that the Board could not cope with the volume of cases that would be thrust upon it if it were required to take jurisdiction of all cases, either directly or indirectly,[6] Congress ultimately enacted Section 14(c) in its present form, which was criticized by its opponents as placing "no limitation whatsoever upon the Board's power to deny employees and employers the protection of the National Labor Relations Act." 105 Cong. Rec. 15542 (1959) (address of Rep. Rayburn, read into record by Rep. Thompson), *reprinted in* 2 Leg. Hist. at 1578. See also 105 Cong. Rec. 15550-15551 (1959) (analysis of Rep. Eliot, read into record by Rep. Bolling), *reprinted in* 2 Leg. Hist. at 1587; 105 Cong. Rec. 17876-17877 (1959) (remarks of Sen. Morse), *reprinted in* 2 Leg. Hist. at 1421. In sum, as the court of appeals concluded (Pet. App. 16a), "Congress

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[4] H.R. 8342, 86th Cong., 1st Sess. (1959), *reprinted in* 1 *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 687, 746 (1959) ("Leg. Hist.").

[5] S. 1555, 86th Cong., 1st Sess. (1959), *reprinted in* 1 Leg. Hist. at 338, 391-392.

[6] See, *e.g.*, 105 Cong. Rec. 6538 (1959) (remarks of Sen. Goldwater), *reprinted in* 2 Leg. Hist. at 1143; 105 Cong. Rec. 14347 (1959) (analysis introduced by Rep. Griffin), *reprinted in* 2 Leg. Hist. at 1522; 105 Cong. Rec. 15546 (1959) (remarks of Rep. Dixon), *reprinted in* 2 Leg. Hist. at 1582.

dealt with the 'No-Man's land' problem by restoring the status quo ante *Guss*, *supra*: It expressly permitted the states to regulate labor relations when the NLRB had jurisdiction but declined to assert it, and preserved the Board's discretion to so decline."

b. The situation here is clearly distinguishable from that which prevailed in *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, *supra*. The statutes involved in that case provided (401 U.S. at 411; citations omitted) that the Secretary of Transportation " 'shall not approve any program or project' that requires the use of any public parkland 'unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park * * *.' " The Court rejected the Secretary's contention that the statute afforded him "wide discretion" because "the requirement that there be no other 'prudent' route require[d him] to engage in a wide-ranging balancing of competing interests." *Ibid.* To the contrary, the Court held (*id.* at 411-412), "no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. * * * Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes." Accordingly, the Court concluded (*id.* at 411) that the statutory language "is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted."

Here, by contrast, both the language and the legislative history of Section 14(c)(1) indicate that Con-

gress intended to vest the Board with very broad discretion to determine whether the policies of the NLRA would be furthered by the Board's assertion of jurisdiction over a particular business or industry (see pages 7-10, *supra*).[7] As the court of appeals noted (Pet. App. 17a), "[t]his conclusion is not surprising," in view of the nature of the decisions the Board is called upon to make under Section 14(c)(1).

> Congress enacted no specific standards, nor did it require the Board to do so by regulation. The impact of labor disputes on commerce is, of course, the overall guide, but the dollar volume of business in interstate commerce is not the only yardstick that the Board can or should consider. Many other factors can be important. For instance, if the states regulate a given industry adequately, labor disputes in that industry might well be reduced to the point where their impact on commerce would be insignificant, whatever the volume of interstate commerce in the industry. In deciding whether to expend its limited resources to regulate one industry, the Board must inevitably consider the effect this will have on its efforts in other industries that are also involved in commerce. In formulating its policies on particular industries, the Board must look at the situation not just in one state, but nationwide.

Ibid.[8]

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[7] The only limitation is that stated in the proviso, which is not applicable to the horseracing industry (see note 3, *supra*).

[8] Thus, contrary to petitioner's suggestion (Pet. 23), the court of appeals did not ignore the statutory phrase "where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." Rather, the court correctly concluded that the statute does not make the dollar volume of business in

In sum, the court of appeals correctly concluded that here, unlike in *Overton Park*, the statute was "'drawn in such broad terms that in a given case there is no law to apply'" (401 U.S. at 410), and that judicial review of the Board's promulgation of Rule 103.3 and its refusal to repeal or amend that rule therefore was foreclosed by 5 U.S.C. 701(a)(2), which excepts from such review "agency action * * * committed to agency discretion by law."

2. Even if the district court had jurisdiction to review the Board's action in promulgating and continuing to adhere to its horseracing rule, that administrative action must be tested by the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A). The reviewing court thus "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, *supra*, 401 U.S. at 416. Contrary to petitioner's contention (Pet. 25-26), the court of appeals correctly concluded that the Board's action satisfied this standard. As the court noted (Pet. App. 18a-19a):

> When it promulgated Rule 103.3 in 1973, the Board properly considered such factors as the extensive state regulation of the horse racing industry, the "unique and special relationship" between the states and the industry, the relative infrequency of labor disputes in the industry, the sporadic and short-term employment, marked by high turnover, and the difficulty thereby posed for effective Board regulation, and the Board's current workload. When the Racing Association

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interstate commerce the only criterion that the Board should consider in determining the effect of the labor dispute on commerce.

petitioned in 1979 for amendment or repeal of the rule, it presented no data suggesting that conditions in the industry as a whole, or even in New York alone, had changed significantly in these respects since 1972-73. The Board therefore relied on its prior analysis in concluding that it should continue to decline to take jurisdiction over the horse racing industry. This is precisely the sort of decision-making that should in the normal course of things be left to the discretion of the agency to which Congress has entrusted it.

3. The court of appeals also correctly determined that the district court lacked jurisdiction to review the Regional Director's denial of the NYRA's 1980 representation petition filed under Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1). Congress has foreclosed judicial review of Board action under Section 9 unless it forms the basis for a bargaining order that is before the court of appeals for review or enforcement. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). In *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958), the Court fashioned a limited exception to this rule, permitting district court jurisdiction to review Board action in contravention of an express statutory mandate. This Court has made clear, however, that "[t]he *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." *Boire* v. *Greyhound Corp.*, *supra*, 376 U.S. at 481. The situation presented by this case does not come within that narrow exception.

Section 9(c)(1) provides that, whenever a representation petition has been filed, "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." As the court of appeals noted (Pet. App. 22a), notwithstanding the use of the word "shall" in Section 9, the courts have construed the provision as affording the Board great latitude in determining whether to proceed with a hearing and therefore as providing no basis for invocation of the *Kyne* exception. See *National Maritime Union* v. *NLRB*, 267 F. Supp. 117, 122-124 (S.D.N.Y. 1967). See also *Physicians National House Staff Ass'n* v. *Fanning*, 642 F.2d 492, 499-500 (D.C. Cir. 1980) (en banc), cert. denied, 450 U.S. 917 (1981); *Pressmen's Union, Local 46* v. *McCulloch*, 322 F.2d 993, 998 n.11 (D.C. Cir. 1963). Likewise, in view of the discretionary nature of Section 14(c)(1) (see pages 7-10, *supra*), "that section, except for the proviso, mandates nothing. It is as far as it can be from the 'clear and mandatory' requirement at issue in Leedom v. Kyne, supra." Pet. App. 22a-23a.

Finally, contrary to the NYRA's contention (Pet. 27-28), the Eleventh Circuit's decision in *Florida Board of Business Regulation* v. *NLRB*, 686 F.2d 1362 (1982), does not warrant further review of this case. In *Florida Board*, the court of appeals held (686 F.2d at 1369) that the district court had jurisdiction, at the suit of the State of Florida, acting through one of its agencies, to issue a declaratory judgment to the effect that the NLRB "lacked statutory and constitutional authority to regulate labor disputes in the jai alai industry as a whole." The

court reasoned (*id.* at 1370) that, since the State's suit did not "seek review of a representation order or a stay of an election or the certification of election results," the rule limiting district court review to extraordinary circumstances was inapplicable.

While the Board agrees with the court below (Pet. App. 24a n.6) that *Florida Board* "gives far too narrow a reading to the applicability of Leedom v. Kyne['s restriction of district court jurisdiction to extraordinary circumstances]," the posture of *Florida Board* in any event distinguishes it from this case. In *Florida Board*, the NLRB had asserted jurisdiction over an industry that was the subject of pervasive state regulation, with the result that *the State, not a private party*, sought declaratory relief concerning the NLRB's authority to regulate labor relations in that industry. There is no reason to assume that the Eleventh Circuit also would sustain the exercise of district court jurisdiction in the situation presented here, viz., where suit is brought not by a state attempting to prevent the NLRB from asserting jurisdiction, but rather by a private party seeking NLRB jurisdiction. See generally *Bishop* v. *NLRB*, 502 F.2d 1024 (5th Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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